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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNISYS CORPORATION,

Petitioner,

v.

CESKA SPORITELNA, A.S.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party to a contract, which has agreed to arbitrate all disputes arising out of the contract, may avoid arbitration by suing a non-signatory corporate affiliate of the contract party, rather than the corporate entity it contracted with?

PARTIES TO THE PROCEEDING

The petitioner is Unisys Corporation. The information required by Supreme Court Rule 29.6 is set forth in Petitioner's Appendix at 21a.

The respondent is Ceska Sporitelna, a.s., a bank located in the Czech Republic.

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---

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on May 28, 1997.

OPINIONS BELOW

The court of appeals ruled by judgment order (App., *infra*, 19a), affirming the opinion of the district court "essentially for the reasons set forth in the district court's opinion." (App., *infra*, 19a). The opinion of the district court (App., *infra*, 1a) is reported at *Ceska Sporitelna, a.s. v. Unisys Corp.*, C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, (E.D. Pa. Oct. 10, 1996), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997). The court of appeals denied Unisys' petition for rehearing or rehearing *in banc*. (App., *infra*, 20a).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on May 28, 1997. A petition for rehearing or rehearing *in banc* was timely filed on June 11, 1997. The court of appeals entered an order denying petition for rehearing or rehearing *in banc* on July 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, provides that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 4 of the FAA permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."

STATEMENT OF THE CASE

The central issue in this case is whether the plaintiff, Ceska Sporitelna, a.s. ("CS"), can avoid the contractual arbitration mechanism it agreed to for disputes arising out of its purchase of a complex computer banking system from Unisys International Services, B.V. ("BV"), by suing BV's parent company, Unisys Corporation ("Unisys"), a non-signatory to the contract, for alleged misrepresentations regarding its subsidiary's ability to deliver the computer system.

In June, 1992, CS, a bank located in the Czech Republic, entered into a contract with BV, a wholly-owned lower tier subsidiary of the defendant Unisys, to purchase a complex computer banking system for an estimated $90 million, calculated on a time and materials basis. In 1994, after system design changes were requested by CS, and after a single meeting in Blue Bell, Pennsylvania with officials of Unisys, CS and the subsidiary BV entered into a new contract which superseded the earlier agreement. This second contract fixed the purchase price at $155 million.[1] In both agreements, CS agreed to arbitration as the mechanism for resolving disputes arising out of its purchase of the computer system. The relevant agreements between CS and BV provided that "any disputes as to the interpretation of [the] contract or as to the performance of either party hereunder ... shall [if not resolved by the parties] be settled by arbitration."

Despite difficulties on the project, substantial work was done and significant deliveries were made to CS. Two mainframe computers, worth approximately $70 million, were delivered to CS early in the project and are still in use today. In addition, a significant percentage of the software deliveries under the contract were made, and are still in use at the bank today. During the approximately three year business relationship between the parties, the project was staffed by dozens of employees from various components of the Unisys system.

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1. Unisys Corporation issued a guarantee of the performance of BV under this contract. CS has not sued on this guarantee (which required any suit be filed in London, England under UK law), nor did this guarantee form the basis of the decision of the district court or the court of appeals.

Indeed, many of the alleged misrepresentations in the Complaint were made by employees and officials of Unisys subsidiaries other than the parent Unisys, and the contract party BV.

Rather than bring its claim against BV in arbitration for BV's alleged inability to deliver parts of the computer system consistent with the schedule promised in the relevant contracts, or against numerous other European subsidiaries which had a more significant role than Unisys throughout the project, CS sued Unisys Corporation for alleged fraudulent misrepresentations which induced CS to enter into and remain in the contracts with BV. The alleged misrepresentations amount to little more than alleged oral statements of the representations made by BV in the contract; namely, that BV could provide a working computer banking system pursuant to the schedule set forth in the contract. *See* Complaint ¶ 2 ("The Defendant's misrepresentations and concealments, as specifically described in this Complaint, first persuaded the Plaintiff to select . . . [a] Unisys computer system . . . and then induced the Plaintiff to continue to pay large sums of money to Unisys subsidiaries, and not to terminate its relationship with Unisys."); Complaint ¶ 3 ("It has now become clear that the system cannot and could never have worked in the manner that the Defendant represented it did.") The fraud claim against Unisys is distinguished from a breach of contract claim against BV solely by the identity of the defendant, and the allegation that the alleged inability to perform was known to Unisys prior to the formation of the relevant contracts. Clearly the selection of Unisys as defendant was a tactical decision intended to avoid the contractual arbitration mechanism, and exploit the more liberal discovery and substantive tort standards of United States' courts.

Unisys argued in the district court that under the Third Circuit's opinion in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993), as well as consistent authority in other circuits, arbitration clauses should be extended to non-signatory affiliates of contract parties where the alleged misconduct relates in a tangible way to the contract containing the arbitration clause. The district court held, however,

that under the Third Circuit's decision in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, — U.S. —, 117 S. Ct. 583 (1996), corporate parents could *never* benefit from arbitration clauses under the non-signatory doctrine set forth in *Pritzker.*

The district court's precise holding was that:

> The case sub judice is more similar to *Dayhoff* than it is to *Pritzker.* As in *Dayhoff* ... the signatory to the Agreement containing the arbitration clause, is a subsidiary of the parent ... the non-signatory ....
>
> ....
>
> We find no support for Unisys's contention [that since the conduct of Unisys and its subsidiaries was "intertwined", this case is governed by *Pritzker]* anywhere in the text of *Dayhoff.* Our reading of *Dayhoff* convinces us that the *decision did not turn on the amount of involvement* [the non-signatories] had with the License Agreement containing the arbitration clause *but solely on the corporate relationship* between [non-signatories and signatories] which the Court refused to disregard. *Since that same corporate relationship is present here, we find that Dayhoff controls.*

Ceska Sporitelna, a.s. v. Unisys Corp., C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, ** 15-17 (E.D. Pa. Oct. 10, 1996) (emphasis added) (App. 9a-10a).

In affirming by judgment order the district court's denial of Unisys petition for arbitration, a panel of the Third Circuit[2] adopted the formalistic reasoning of the district court, stating that:

> After consideration of all contentions raised by the appellant, it is

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2. The court of appeals had jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. § 16, which authorizes an immediate appeal as of right from orders of a district court adverse to arbitration.

> ADJUDGED AND ORDERED that the judgment of the district court entered on October 10, 1996, be and is hereby **AFFIRMED,** essentially for the reasons set forth in the district court's opinion.

Order, May 28, 1997 (App. 19a). Unisys Petition for Rehearing or Rehearing *In Banc* was denied on July 7, 1997. (App. 20a).

REASONS FOR GRANTING THE WRIT

Ceska Sporitelna entered into a contract to purchase a Unisys computer system, and agreed that all disputes arising out of the contract would be submitted to arbitration. When a dispute did arise regarding performance of the contract, CS did not submit the dispute to arbitration, but instead made it the basis of a lawsuit in federal district court. CS avoided the arbitration clause by suing an entity in Unisys' multinational structure with which it *did not* contract (and, which, conveniently, is subject to jurisdiction of U.S. courts) rather than the entity with which it did.

If this litigation tactic is tolerated, then the Congressional policy in favor of enforcing arbitration agreements will be rendered meaningless in the circumstance where this Court has treated it as most important—disputes arising out of international business transactions. It is a staple of international commerce for United States corporations to act and to *contract* through foreign subsidiaries; indeed, it is often a legal requirement of the country in which business is to be performed that the United States corporation do so.

Because corporate affiliates of contract parties are convenient targets of litigants attempting to avoid arbitration clauses, most federal circuits have adopted a practical rule, grounded in principles of contract, agency, and estoppel, which extends arbitration clauses to non-signatory affiliates where the conduct alleged against the non-signatory is intertwined with the contract which contains the arbitration agreement. There is, in fact, authority for this proposition in the Third Circuit from which this case arises. There is no reasoned basis, and there was no authority (until the Third Circuit affirmed the district court's reasoning in this case) for the proposition that the prudential doctrine pursuant to which arbitration clauses are extended to non-signatory affiliates of contract parties is suspended when the non-signatory is a corporate parent of the contract party.

This Court should intervene to cure this aberration in the circuits. Multinational corporations entering agreements through subsidiaries in foreign countries must be able to fore-

cast at the time they contract whether the dispute mechanism intended for the project is the one that will in fact be compelled when a dispute arises. If the rule adopted by the Third Circuit — disputes arising out of a contract containing an arbitration clause will not be submitted to arbitration if the suit is plead against the parent corporation of a contract party — is allowed to stand, there will be no practical mechanism for multinational corporations to prospectively channel disputes arising out of international transactions to arbitration.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH OPINIONS IN OTHER CIRCUITS

The Federal Arbitration Act treats arbitration clauses as "valid, irrevocable, and enforceable" in Federal district courts. 9 U.S.C. §§ 2, 4. Virtually every circuit that has considered the issue of whether parties to contracts containing arbitration clauses subject to the Federal Arbitration Act can plead around that commitment by suing parties affiliated with the contract party, rather than the contract party itself, has adopted some version of the practical doctrine extending arbitration clauses to affiliated non-signatories. *See, e.g., Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Arnold v. Arnold Corp.-Printed Communs. for Bus.*, 920 F.2d 1269 (6th Cir. 1990); *In re Oil Spill By the "Amoco Cadiz", etc.*, 659 F.2d 789 (7th Cir. 1981); *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993); *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994); *cf. McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) (recognizing non-signatory doctrine based on contract and agency principles, but declining to apply it to claim of fraud against non-signatory corporate officer involved in asset transfer transaction). A similar rule has developed to protect the sanctity of forum selection clauses. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988).

In those cases where non-signatories petition for arbitration, the unifying principle underlying the determination of arbitrability has been the *relationship of the alleged conduct* of the non-signatory *to the contract* containing the arbitration clause. If the alleged wrongful conduct relates to the contract containing the arbitration clause, the arbitration clause is extended to the non-signatory. *See Britton*, 4 F.3d at 747 (the key issue was whether the non-signatory's alleged wrongdoing "relate[s] to or arise[s] out of the contract containing the arbitration clause"); *Sunkist Soft Drinks*, 10 F.3d at 757-58 ("The focus of our inquiry should be on the nature of the underlying claims asserted by Sunkist against Del Monte."); *J.J. Ryan & Sons*, 863 F.2d at 320-21 ("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."); *Thomson-CSF, S.A.*, 64 F.3d at 779-80 (although declining to do so on the facts, court recognized that extending arbitration clause to non-signatory parent company was appropriate when the claims against the parent company are integrally related to the contract containing the arbitration clause); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1016-17 (M.D. Ala. 1997) ("What is necessary is that the claim against the nonsignatory be inextricably bound up with the terms and duties of the contract the plaintiff has signed with the other defendant."); *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 957 F. Supp. 839, 841-42 (S.D. Miss. 1997) ("The Court finds that the doctrine of equitable estoppel should apply in cases in which a non-signatory seeks to enforce an arbitration agreement against a signatory to that agreement where the non-signatory is an agent of a signatory or where the claims against the non-signatory are 'intimately founded in and intertwined with' the agreement containing the arbitration clause.") (citation omitted); *Usina Costa Pinto, S.A. Acucar E Alcool v. Louis Dreyfus Sugar Co.*, 933 F. Supp. 1170, 1179 (S.D.N.Y. 1996) (since the obligations under contract containing arbitration clause were at the heart of the fraud claim, and because the parent had played a significant role in the formation and

execution of the contracts, it was entitled, despite its status as non-signatory, to invoke the arbitration clause); *Vitzethum v. Dominick & Dominick, Inc.*, Nos. 94 Civ. 4938, 95 Civ. 429, 1996 WL 19062, ** 5-7 (S.D.N.Y. Jan. 18, 1996) (claims against non-signatory parent company for allegedly fraudulently inducing plaintiffs to enter into investment contracts with the parent's corporate subsidiaries were arbitrable); *Prograph Int'l v. Barhydt*, 928 F. Supp. 983, 990-91 (N.D. Cal. 1996) (agency principles mandated submitting the plaintiff's employment related tort and contract dispute against a subsidiary of the contracting party to arbitration in light of the fact that the allegations against the subsidiary did not diverge substantially from those against the parent company); *cf. Manetti-Farrow, Inc.*, 858 F.2d at 514 n.5 ("[T]he alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants."); *Texas Source Group v. CCH, Inc.*, 967 F. Supp. 234, 237 (S.D. Tex. 1997)("[Non-signatory's] relationship with the plaintiffs and the defendants is so inextricably intertwined that he should be subject to the forum-selection clause.") [3]

This practical rule regarding arbitrability of disputes against non-signatories has been developed to insure against the avoidance of agreed upon dispute resolution mechanisms through clever pleading. *See "Amoco Cadiz"*, 659 F.2d at 796; *see also McBro Planning and Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984) ("[I]t is well

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3. The practical test for determining the arbitrability of disputes against non-signatories has also been adopted in state courts. *See Carlin v. 3V Inc.*, 928 S.W. 2d 291 (Tex. Ct. App. 1996). Following the federal authorities, the court in *Carlin* described the proper analysis as follows:

> *J.J. Ryan, McBro, Hughes, and Sunkist*, were all decided on the same ultimate fact, that each party must rely on the terms of the written agreement in asserting their claims. The focus of the inquiry in each of these cases was on the nature of the underlying claims asserted by the party resisting arbitration and to determine whether these claims were within the scope of the arbitration clause contained in the agreement.

Id. at 296; *cf. Lu v. Dryclean-U.S.A. of California, Inc.*, 14 Cal. Rptr. 2d 906, 908 (Ct. App. 1992) (forum selection clause enforced in favor of non-signatories because the conduct alleged against them "is closely related to the contractual relationship").

established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract."); *Sam Reisfeld & Son Import Co.*, 530 F.2d at 681 ("If the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."); *Chase v. Check*, 158 F.R.D. 59, 63 (E.D. Pa. 1994)("[The non-signatory] rule ... makes sense because if plaintiffs 'can avoid the practical consequences of an agreement to arbitrate by naming non-signatory parties as defendants ... the effect of the rule requiring arbitration would, in effect, be nullified.' ") (citation omitted); *Vitzethum*, 1996 WL 19062 at * 7 ("Plaintiffs cannot escape enforcement of the arbitration agreement simply by suing the parent, [non-signatory], rather than [the subsidiary non-signatory]."); *see also* Scott M. McKinnis, *Enforcing Arbitration With a Nonsignatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil*, 1995 J. Disp. Resol. 197, 211 (1995) ("[A] corporation will not be allowed to avoid the effects of an arbitration clause based on the nonsignatory status of defendant while simultaneously asserting claims against the nonsignatory party arising from the same contract."); *cf. Lu*, 14 Cal. Rptr. 2d at 908 ("To hold [that the fact that the non-signatories did not sign the Agreement renders the forum selection clause unenforceable] would be to permit a plaintiff to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant.")

In instances where the alleged tort or fraud is linked to performance under or negotiation of the contract containing the arbitration clause, courts have routinely found that the practical test for extending arbitrability to non-signatories has been met. *See Sunkist Soft Drinks*, 10 F.3d at 758 ("It is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract.")(citation omitted); *Usina Costa*, 933 F. Supp. at 1179 ("[B]ecause of ... the integral link between the fraud claim and the underlying contractual obligations [the] nonsignatory may invoke the arbitration clause."); *cf. Lu*, 14 Cal. Rptr. 2d at 908 (non-signatories alleged to have partici-

pated in the fraudulent representations which induced plaintiffs to enter into the agreement are bound by forum selection clause in agreement).

The non-signatory doctrine appeared to be the law in the Third Circuit as well. In *Pritzker,* that court held that defendant Merrill Lynch Asset Management should benefit from an arbitration clause in the agreement between plaintiffs and its corporate affiliate Merrill Lynch. In so holding, the Court applied "agency logic" to the allegations in the complaint, focusing on the overlap between the alleged conduct of the signatory and non-signatory. *Pritzker,* 7 F.3d at 1122. The Court concluded by observing that "[w]here the parties to [an arbitration clause] unmistakably intend to arbitrate all controversies which might arise between them, their agreement should be applied to claims against agents or *entities related to the signatories." Id.* (emphasis added).

The non-signatory doctrine was addressed again in the Third Circuit's decision in *Dayhoff,* which held that the interconnectedness or agency relationship necessary to extend an arbitration clause to a non-signatory is not proved *solely* by the presence of a parent/subsidiary corporate relationship. In that case, the corporate parent which was the primary focus of the court's opinion had neither negotiated nor performed under the contract containing the arbitration clause, and became a participant in the relevant business relationships after the contract containing the arbitration clause had been terminated. This circumstance distinguishes *Dayhoff* from *Pritzker* and the other federal court decisions because, unlike in those cases, the claims against the corporate parent were not "intimately founded in and intertwined with" the contract containing the arbitration clause. *Sunkist Soft Drinks,* 10 F.3d at 758.

The district court holding adopted by the panel largely ignored *Pritzker* and relied on *Dayhoff,* solely because the relationship between the non-signatory and signatory in the instant case — parent/subsidiary — was identical to that of the non-signatory and signatory in *Dayhoff.* The district court failed to state a principled distinction between the

parent/subsidiary corporate relationship and the affiliate corporate relationship in *Pritzker* that would justify making the parent/subsidiary relationship determinative of arbitrability of the dispute. Numerous courts have extended arbitration clauses to non-signatories linked to the contract party by a parent/subsidiary relationship. *See, e.g., Sunkist Soft Drinks,* 10 F.3d at 757-58; *J.J. Ryan & Sons, Inc.,* 863 F.2d at 320-21; *Vitzethum,* 1996 WL 19062 at * 7; *In re Salomon Inc. Shareholders Derivative Litig.,* No. 91 Civ. 5500 (RPP), 1995 WL 533595, ** 5-6 (S.D.N.Y. Sept. 30, 1994); *cf. Manetti-Farrow, Inc.,* 858 F.2d at 514 n.5 (applying forum selection clause to non-signatory parent corporation). Indeed, in its brief before the court of appeals, respondent never argued that corporate relationship alone should determine arbitrability.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S INTERPRETATION OF THE FEDERAL ARBITRATION ACT

This Court has interpreted the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.,* to be "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983). "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985).

The district court, whose holding and reasoning the Court of Appeals adopted, exercised formalistic reasoning that in fact defeats the contracting parties' intention to arbitrate disputes arising out of the contract. The district court refused to apply the non-signatory doctrine articulated in *Pritzker,* and numerous cases outside the Third Circuit, because, citing *Dayhoff,* it refused to disregard the corporate structure that makes parent and subsidiary corporations different legal entities. *Ceska Sporitelna,* 1996 U.S. Dist. Lexis 15435 at *16.

This reasoning ignores the fact that CS has disregarded the corporate structure by pleading its lawsuit against a mem-

ber of the multinational corporation with which it did not contract, rather than the one with which it did. CS seeks to treat Unisys Corporation and its subsidiaries as one enterprise for purposes of liability, but as distinct juridical entities when interpreting the application of the arbitration commitment. It will always be the case that in transactions involving multi-tiered corporations, there will be participation and oversight by corporate entities affiliated with the contract parties. In this transaction, there was such involvement by numerous European subsidiaries, non-parties to the contract, from the very beginning of the transaction through the termination of the contract. That involvement was expanded to address problems on the project, as Unisys marshaled its institutional resources in an effort to preserve the relationship. If the lower court's formalistic reading of the contract — that only signatories can benefit from the arbitration clause — is correct, it means that Unisys, by involving non-contract subsidiaries, discarded its right to arbitration at the outset of the contract, and through its efforts to salvage the project.[4] Such a counterintuitive and counterproductive circumstance exposes the defect in the lower court's rigid and formalistic reasoning.

The non-signatory doctrine developed by the lower federal courts is a practical rule that accommodates common business practice, and is consistent with this Court's position that the parties' "intentions are generously construed as to issues of arbitrability." The non-signatory doctrine serves business expectations and fundamental fairness by insuring that the primary intention of the parties to an arbitration agreement — that *all disputes* arising out of the contract be arbi-

4. For example, a primary delivery under the original contract was the mainframe computers, comprising $70 million of the estimated total of $90 million under the contract. These mainframe computers were developed and manufactured by Unisys Corporation; nobody could ever have been working under the delusion that the small subsidiary BV had either the personnel or the facilities to assemble these deliveries. Yet under the formalistic approach taken by the lower courts and advanced by CS, any disputes regarding those mainframes could be raised against Unisys in any forum with jurisdiction over the parties, despite the fact that they were sold as part of a contract containing an arbitration clause.

trated — is not defeated by the availability of a corporate affiliate as a litigation target. Moreover, courts that recognize the non-signatory doctrine have applied it with sensible limitations so that a non-signatory can only benefit from the arbitration provision in a contract when the misconduct alleged against the non-signatory arises out of the contract. *See Thomson-CSF, S.A.*, 64 F. 3d at 780 (claim that parent purchased signatory subsidiary in order to eliminate plaintiff which had exclusive agreement to supply equipment with subsidiary "can hardly be characterized as arising out of or being integrally related to the ... Agreement"); *Britton*, 4 F.3d at 748 ("[A]cts [alleged] are subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract.")

Here, the complaint alleges misconduct almost indistinguishable from a claim alleging breach of the contract containing the arbitration clause. The alleged misrepresentations amount to little more than oral versions of the representations made by BV in the contract; namely, that BV could provide a working computer banking system pursuant to the schedule set forth in the contract. Complaint ¶ 3 ("It has now become clear that the system cannot and could never have worked in the manner that the Defendant represented it did.") Since CS "must rely on the terms of the written agreement in asserting [its] claims," *Carlin*, 928 S.W. 2d at 296, it must also be bound to the dispute resolution mechanism in that agreement.

III. THE COURT OF APPEALS' DECISION UNDERMINES PREDICTABILITY IN INTERNATIONAL BUSINESS TRANSACTIONS

This Court has previously stated that the "federal policy [in favor of arbitral dispute resolution] applies with special force in the field of international commerce." *Mitsubishi Motors Corp.*, 473 U.S. at 631. The reason that the Court placed special emphasis on arbitration clauses in the international context is that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition

to achievement of the orderliness and predictability essential to any international business transaction." *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)).

In cases enforcing both arbitration agreements and forum selection clauses, this Court has emphasized the importance of prospective certainty about dispute mechanisms for participants, both domestic and foreign, in the international business community. *Scherk*, 417 U.S. at 517; *see also, M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-12 (1972) ("Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter.")

The rule articulated by the district court and adopted by the court of appeals works in opposition to the principles of predictability and consistency emphasized by this Court, a circumstance which, if allowed to persist, will cast a chill over international business relationships. *See Scherk*, 417 U.S. at 517 ("[T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of business to enter into international commercial agreements.") Since corporate affiliates of contract parties will often oversee or provide personnel in support of complex business projects, and, in any event, can easily be alleged to have done so, prospective efforts to channel disputes to arbitration will be dependent on the parties' whims, not legal enforcement.

The only way that multinational corporations could avoid the "end around" the arbitration clause effected by CS here would be, as the court of appeals suggested during argument, to have every branch, division and affiliate of the multinational corporation sign the contract containing the arbitration clause, or to simply discard the subsidiary and export directly from the parent corporation's home state into the foreign country. Such a suggestion is impracticable given the legal, regulatory, and tax consequences that would result, and it would mean, in effect, that corporate entities that the law has allowed to act independently, must always act in unison in order for contractual disputes to be subject to arbitration. Cor-

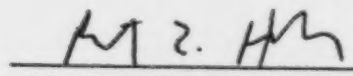
porations typically provide services and products in foreign countries through a subsidiary located in that country, rather than simply exporting into the foreign country, either because that local presence is required by the host state, or because tariffs have been set so high that, as a practical matter, local production is a requirement of doing business. P.T. Muchlinski, *Multinational Enterprises and the Law 44-45 (1995);* Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* 69 (1982). If multinational corporations must have all constituents become signatories to every agreement, or become the principals in every agreement, they will be unable to compete in foreign markets under the rules set by foreign governments.

Where a legal rule causes business entities to act contrary to rational competitive business practice — as the Third Circuit's neutering of the non-signatory doctrine threatens here — the legal rule bears examination. Where the majority of courts have developed a contrary legal doctrine that dovetails with business practice, the inconsistent legal rule must be discarded. *See Bulova Watch Co. v. K. Hattori & Co.,* 508 F. Supp. 1322, 1327 (E.D.N.Y. 1981)(Judge Weinstein) ("We tend to come closer to the mark when we examine a business relationship from the practical viewpoint of businessmen rather than through the distorting lens of a legal conceptual framework established in an earlier era.")

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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1996 U.S. Dist. LEXIS 15435 printed in FULL format.

CESKA SPORITELNA, a.s. VS. UNISYS CORPORATION

C.A. NO. 96-4152

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1996 U.S. Dist. LEXIS 15435

October 10, 1996, Decided

October 10, 1996, FILED

DISPOSITION: [*1] Motion of the defendant to compel arbitration DENIED. Motion of the defendant to dismiss DENIED.

COUNSEL: For CESKA SPORITELNA, a.s., PLAINTIFF: J. BRUCE MC KISSOCK, MC KISSOCK & HOFFMAN, P.C., PHILA, PA USA. ROBERT J. KALER, GADSBY & HANNAH, BOSTON, MA USA.

For UNISYS CORPORATION, DEFENDANT: ROBERT L. HICKOK, PEPPER, HAMILTON & SCHEETZ, PHILA, PA USA. LAWRENCE P. BYRNES, UNISYS CORPORATION, BLUE BELL, PA USA.

JUDGES: CHARLES R. WEINER

OPINION BY: CHARLES R. WEINER

OPINION: MEMORANDUM OPINION AND ORDER

WEINER, J.

OCTOBER 10, 1996

This is a civil action for fraud in which the plaintiff, Ceska Sporitelna, a.s. ("CS"), the largest savings bank in the Czech Republic, seeks to recover substantial damages from the defendant Unisys Corporation ("Unisys") as a result of a series of fraudulent misrepresentations allegedly made by Unisys to CS. Specifically, CS contends that Unisys's alleged misrepresentations and "first persuaded [CS] to select an

unproven, unfinished, and largely unworkable Unisys computer system . . . , and then induced [CS] to continue to pay large sums of money to Unisys subsidiaries, and not to terminate its relationship with Unisys, when the insoluble problems with that [*2] computer systems began to manifest themselves." Complaint at P 2. Presently before the court is the petition of Unisys to compel arbitration pursuant to section 4 of the Federal Arbitration Act, *9 U.S.C.* § 4 or, in the alternative, to dismiss for failure to join necessary and indispensable parties, for failure to state a claim upon which relief can be granted and under the doctrine of forum non conveniens. For the reasons which follow, both the petition to compel arbitration and the motion to dismiss are denied.

OVERVIEW OF THE COMPLAINT

CS is a privatized retail banking institution organized under the laws of the Czech Republic with its principal place of business in Prague, and branch offices throughout the Czech Republic. Complaint at P 4. As part of its effort to modernize its operations to enable it to compete in the retail banking environment of its developing free market economy, CS decided in 1991 to procure and install a new computer system which would allow it to conduct most of its retail banking electronically. Id. at PP 8-9. CS sought information on the availability of such systems from a number of Western computer companies, including Unisys, a Delaware [*3] corporation with its principal place of business in Blue Bell, Pennsylvania. Id. at PP 5, 10.

The Complaint alleges that in the summer of 1991, CS invited a number of computer companies, including Unisys, to respond to questions concerning the characteristics of the electronic banking systems that they proposed to supply to CS. Id. at 11. In November of 1991, Unisys presented to CS a written document entitled "RESPONSE TO QUESTIONS FROM CZECH STATE SAVINGS BANK, CSFR", in which Unisys made a number of glowing representations about the computer system ("the System") that it proposed to supply to CS, including that the System was a proven, workable, state of the

art system that could be supplied within the time frame contemplated by CS. Id. at PP 11-12, 14.

The Complaint further alleges that in 1992, Unisys gave a misleading demonstration of the "Octagon" portion of the System to CS in Uxbridge, England. Id. at PP 19, 21. Thereafter, in February of 1992, a Unisys representative, Hugo Simpson, made a further presentation at CS in which he misrepresented to CS that Unisys's "banking systems were installed in approximately 40 out of 52 leading world banks." Id. at P [*4] 20.

The Complaint alleges that in reliance on these representations and demonstrations, CS, on February 28, 1992, agreed to pay approximately $ 450,000 to a Unisys subsidiary, Unisys World Trade Inc., ("World Trade") to obtain introductory consulting services, training and a management and technical report in preparation for the delivery of the System. Id. at P 21. Following another presentation during which Unisys representatives Stephen Williams, Jan Necas, and John Thompson, repeated previous written and oral representations concerning the System, CS agreed, in June of 1992, to pay an estimated $90,000,000 to a second Unisys subsidiary, Unisys International Services, BV, ("BV") to implement the delivery to CS of the System. Id. at PP 22-23.

In September, 1993, CS advised James Unruh, the Chairman and CEO of Unisys, that the System was not working properly. Id. at P 24. On September 23, 1993 and again on October 8, 1993, Unruh responded by reassuring CS "that a Unisys team of experts had identified the nature of the fault, and that Unisys was working on a remedy, and that he was confident that the resolution would be available in a short period of time." Id at [*5] P 25.

Because the problems continued, senior representatives of CS met with senior officials of Unisys at Unisys's Blue Bell headquarters on January 12, 1994. Id. at P 26. At that meeting, Unruh expressly represented to CS, inter alia, that the installation of the System was a Unisys project and that Unisys "would guarantee that the problems were solved and that

CS was satisfied with the System." Id. at P 27. In a document dated January 12, 1994, Unisys put this guarantee in writing. Id. at P 29.

The Complaint alleges that Unisys made the misrepresentations at the meeting on January 12, 1994 "in order to conceal the fraudulent nature of its previous misrepresentations to CS about the Unisys System, to induce CS not to terminate its relationship with Unisys, and to misled CS into paying more money to Unisys subsidiaries in a futile effort to complete the installation of the Unisys System, which Unisys knew could not work in the manner represented." Id. at P 31. In reliance on these alleged misrepresentations, CS, on March 31, 1994 entered into a new contract with BV ("the 1994 Agreement") pursuant to which CS made payments to BV for the completion of the System. [*6] Id. at P 32. In early 1995, CS, after finally realizing that the System was never going to work, terminated its relationship with Unisys. Id. at P 33.

The complex relationship between Unisys and its subsidiaries is detailed in the unrefuted affidavit of Ronald Anderson, Unisys's Assistant Secretary. According to the affidavit, World Trade, a Delaware corporation with offices in Florida, England and Singapore, is a wholly-owned subsidiary of Unisys. Anderson affidavit at P 3. BV, a Dutch corporation with its principal place of business in the Netherlands, is owned by Unisys Holding Corporation and by Unisys Investments SA ("SA"). Id. at P 4. SA is a Swiss company and a wholly-owned subsidiary of Unisys Holding Corporation. Id. at P 5. Unisys Holding Corporation is a Delaware corporation and a wholly-owned subsidiary of Unisys. Id. at P 6. Unisys Europe Africa Limited ("UEAL") is an English corporation with its principal place of business in Uxbridge, England. Id. at P 7. Prior to July 1, 1996, UEAL was owned by both SA and by Unisys Holding Corporation. Id. After July 1, 1996, both SA and Unisys Holding Corporation sold their stakes in UEAL to Unisys Holdings, [*7] an English corporation. Id. at P 8. Unisys Holdings is a different company from Unisys Holding Corporation. Id. Unisys Holdings is owned by Unisys Holding Corporation, BV and by Unisys in trust for

Unisys Holding Corporation. Id. The affidavit avers that as a result, all of the above corporations are owned by Unisys, either directly or through wholly-owned subsidiaries. Id. at P 9.

PETITION TO COMPEL ARBITRATION

Unisys argues that an arbitration clause contained in the 1994 Agreement between CS and BV requires CS and Unisys to arbitrate CS's fraud claim against Unisys. That clause provides, inter alia, that any disputes which the parties cannot settle privately "shall be settled by arbitration unless otherwise disposed of by agreement between the parties" and that "any award of the arbitrators shall be final and binding." Appendix to Defendant Unisys Corporation's Memorandum of Law in Support of its Petition to compel Arbitration, Exhibit 4, P 27.2, p. 45. The clause further provides that the rules governing any arbitration will be the United Nations Commission of International Trade Law ("UNCITRAL") Arbitration Rules. Id., P 27.3, p.45. The forum for [*8] arbitrating any disputes between CS and CV is Vienna, Austria. Id., P 27.12, p. 46.

CS responds that since Unisys was not a signatory to the 1994 Agreement, there was never any agreement between CS and Unisys to arbitrate CS's fraud claim against Unisys. In further support of this contention, CS cites the affidavit of its Vice-Chairman of the Board, Karel Kotrba, in which Dr. Kotrba avers, inter alia, that in the 1994 Agreement, CS "agreed to arbitrate only disputes between itself and the party with whom it was contracting. . ." Kotrba affidavit at P 4 (emphasis in original). Kotrba also avers that "CS never even considered entering into an agreement with Unisys Corporation to arbitrate [fraud] claims" and "never entered into any agreements with Unisys Corporation to arbitrate any claims" Id. at P 9 (emphasis in original).

Although Unisys admits it was not a signatory to the 1994 Agreement between CS and its subsidiary, BV[1], Unisys argues

1. Unisys's Memorandum of Law in Support of its Petition to Compel Arbitration at 14.

that it is nevertheless entitled to invoke the arbitration clause in that Agreement and arbitrate the dispute sub judice based on the holding of our Court of Appeals in *Pritzker v. Merrill, Lynch, Pierce, Fenner & [*9] Smith, 7 F.3d 1110 (3d Cir. 1993)*. CS responds that the holding in Pritzker was quite narrow and that pursuant to the more recent authority of our Court of Appeals in *Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503 (3d Cir 1994)*, aff'd, *First Options of Chicago, Inc. v. Kaplan, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995)* and *Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287 (3d Cir. 1996)*, the petition to compel arbitration must be denied.

Section 2 of the Federal Arbitration Act provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Section 4 of the [*10] FAA requires a district court to order the parties "to proceed to arbitration in accordance with the terms of the agreement" when a party refuses to participate in arbitration. When considering a petition to compel arbitration which, as here, is opposed on the ground that no agreement to arbitrate had been made between the parties, we "should give the opposing party the benefit of all reasonable doubts and inferences that may arise." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980)*.

In Pritzker, the trustees of a pension plan brought an action against their brokerage firm, one of its financial consultants, and a sister corporation for various ERISA violations. Although the plaintiffs had an arbitration agreement with the brokerage firm only, our Court of Appeals also compelled arbitration of the claims against the employee and the sister corporation as well, despite their absence as signatories to the arbitration agreement. The Court of Appeals reasoned that "because a principal is bound under the terms of a valid arbi-

tration clause, its agents, employees, and representatives are also covered under the terms of such agreements." *7 F.3d at 1121. [*11]*

Following Pritzker, our Court of Appeals, in Kaplan, held that the Kaplans could not be compelled to arbitrate claims made pursuant to various contracts because they individually had not signed the specific contract containing the arbitration clause, although they had signed related contracts. *Kaplan, 19 F.3d at 1516.* The Court distinguished Pritzker by observing that in Pritzker, the question was whether persons who acted wrongfully on behalf of their principal or without its authority could be compelled to arbitrate under an arbitration agreement the principal had signed and therefore Pritzker simply involved an application of "agency principles". *19 F.3d at 1514.*

In affirming our Court of Appeals, the Supreme Court wrote:

Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.

First Options, 115 S. Ct. at 1924. (citations omitted). The Court went on to state:

After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but [*12] to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.'

Id. at 1925 (citations omitted).

In Dayhoff, Dayhoff, Inc. and Heinz Dolciaria S.p.A. were the assignees to a License Agreement pursuant to which Dayhoff was granted the exclusive license to make and sell certain candy in the United States. The License Agreement contained an arbitration clause which provided that, inter alia, all controversies arising from the License Agreement would be settled by an international arbitration tribunal. Heinz Dolciaria was a subsidiary of Heinz Italia S.p.A., which, in turn, was a subsidiary of H.J. Heinz Co. Following termination of the License Agreement by Heinz Italia, Dayhoff brought

suit against, inter alia, Heinz Dolciaria, Heinz Italia and H.J. Heinz. The district court dismissed all the claims relating to the License Agreement because of the arbitration clause in that Agreement. Citing the opinions in Kaplan as controlling precedent, our Court of Appeals found that the arbitration clause in the License Agreement "can be enforced only by the signatories to [that] Agreement." *Dayhoff 86 F.3d at 1296.* [*13] The Court further stated:

Nor do we believe any of the other cases cited by appellees are persuasive here, as those cases all may be distinguished from that before us.[2] We also point out that Heinz Italia and H.J. Heinz should not by reason of their corporate relationship with Heinz Dolciaria be able to invoke the arbitration clause[s], for there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters. If Heinz Italia and H.J. Heinz wanted to be able to invoke the arbitration clause[s], they should have directed Heinz Dolciaria to include appropriate language in the 1989.. agreement[s] allowing them to do so.

Id. (emphasis added). In an amendment to its opinion, the Dayhoff Court distinguished Pritzker as follows:

. . . our holding in Pritzker does not alter our decision here. In that case, we affirmed the idea that 'because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements.' [citations omitted] We also held there that an [*14] arbitration agreement between pension plan trustees and a securities broker applied to the broker's sister corporation that acted as the broker's adviser and that allegedly participated knowingly in breaches of fiduciary

2. One of these cases is also cited by Unisys in its brief in support of it petition to compel arbitration. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir 1988)* ("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.")

duties owed to the plan. Even though the sister corporation had not signed the arbitration agreements, we applied agency logic in finding that the sister corporation's interests were directly related to, if not predicated upon, the broker's conduct and that the trustee's claims against it were therefore subject to compulsory arbitration. Clearly, this agency theory is not applicable to the facts before us.

Dayhoff (Amend. to Op.), 1996 U.S. App. LEXIS 18266 at 1-2 (July 24, 1996) (emphasis added).

[*15]

Thus, Pritzker constitutes an exception to the general rule that only signatories to a contract can be bound by an arbitration clause found within the contract by holding that where the non-signatories are agents, employees or representatives of their principal who is a signatory to the contract and the agent's interests are co-extensive with those of its principal, the non-signatories are still bound by the arbitration clause. In Dayhoff, on the other hand, there was no principal/agent relationship between the non-signatories, H.J. Heinz Co. and Heinz Italia, and the signatory Heinz Dolciaria but rather a parent/subsidiary corporate relationship which the Court of Appeals refused to disregard. Accordingly, H.J. Heinz and Heinz Italia, as the parent corporations, were not bound by the arbitration clause in the License Agreement which was signed by only the subsidiary, Heinz Dolciaria.

The case sub judice is more similar to Dayhoff than it is to Pritzker. As in Dayhoff, CV (Heinz Dolciaria), the signatory to the Agreement containing the arbitration clause, is a subsidiary of the parent Unisys (Heinz Italia, HJ Heinz), the non-signatory. There is simply no principal/agent [*16] relationship present between Unisys and CV as there was between the brokerage firm and its financial consultant/sister corporation in Pritzker. Nor has CS asserted any claims in this action against any agents, representatives or employees of Unisys. It follows that, as in Dayhoff, Unisys "should not by reason of [its] corporate relationship with [CV] be able to invoke the arbitration clause[s] [in the 1994 Agreement between CS and BV], for there is no more reason to disregard the corporate

structure with respect to such claims as there would be to disregard it with respect to other legal matters." *86 F.3d at 1296.* As in Dayhoff, if Unisys "wanted to be able to invoke the arbitration ... clause[s], [it] should have directed [BV] to include appropriate language in [those] agreements allowing [it] to do so." Id.

Unisys contends that the Court of Appeal's decision in Dayhoff not to follow Pritzker and allow the non-signatories to invoke the arbitration clause in the License Agreement was based not simply on the fact that they were the parent companies of Heinz Dolciaria but because neither H.J. Heinz nor Heinz Italia had any "meaningful connection [*17] to the license agreement containing the arbitration clause." Unisys's Memorandum of Law in support of its Petition to Compel Arbitration at 19. Unisys claims that since the conduct of Unisys and its subsidiaries was "intertwined", this case is identical to Pritzker.

We find no support for Unisys's contention anywhere in the text of Dayhoff. Our reading of Dayhoff convinces us that the decision did not turn on the amount of involvement H.J. Heinz and Heinz Italia had with the License Agreement containing the arbitration clause but solely on the corporate relationship between H.J. Heinz and Heinz Italia and Heinz Dolciaria which the Court refused to disregard. Since that same corporate relationship is present here, we find that Dayhoff controls. Indeed, it appears from the Pritzker, Kaplan and Dayhoff line of cases that only where the signatories and non-signatories first share a principal/agent relationship does it matter whether the non-signatories and signatory's interests are co-extensive so as to make the arbitration clause applicable to the non-signatory.

Pursuant to the Kaplan opinions and the Dayhoff decision, we find that since Unisys was not a [*18] signatory to the 1994 Agreement and therefore there was no agreement between CS and Unisys to submit this dispute to arbitration, the petition of Unisys to compel arbitration must be denied.

MOTION TO DISMISS

Having denied Unisys's petition to compel, we now consider Unisys's motion to dismiss. Unisys makes a number of arguments why this action should be dismissed, all of which are without merit.

Unisys first argues that this action must be dismissed because CS has failed to join necessary and indispensable parties. Specifically, Unisys contends that CS has failed to name as defendants World Trade and BV, the subsidiaries who actually contracted with CS. Unisys argues that since "BV is a Dutch corporation which cannot be joined in this action, and because BV is indispensable to this action, the action must be dismissed pursuant to Fed.R.Civ.P. 19." Unisys's Memorandum of Law at 23. We do not agree.

Rule 19(a) of the Federal Rules of Civil Procedure provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in [*19] the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the parties already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

If a prospective party falls into either of the above two categories, but may not be joined because jurisdiction would be destroyed, the court must determine under Rule 19(b) whether "in equity and good conscience" the action should proceed without the absent party or whether the absent party is indispensable and the action should be dismissed. *Steel Valley Authority v. Union Switch and Signal Division, 809 F.2d 1006, 1013 (3d Cir. 1987).* We need only reach subsection (b) if we first determine that the absent party is a necessary party under subsections (a)(1) or (2).

Neither CV nor World Trade are necessary parties under Rule 19(a)(1). CS has [*20] brought a fraud action against Unisys, the parent of CV and World Trade based on Unisys's alleged misrepresentations to CS. The Complaint does not contain any allegations of fraud against CV or World Trade. Rather, according to the allegations in the Complaint, it appears the only cause of action CS would have against these subsidiaries is one for breach of contract which, according to those contracts, would be subject to arbitration. Neither World Trade nor CV has a claimed or apparent interest in the same relief sought by CS against Unisys. In addition, Unisys does not need either World Trade or CV to be added as parties in order to be able to defend itself against CS's claim for fraud. As a result, complete relief on CS's fraud claim against Unisys can be accorded without CV and World Trade being added as parties.

Nor are CV or World Trade necessary parties under Rule 19(a)(2). As noted above, this action is simply one for fraud against the parent of CV and World Trade. The Complaint contains no allegations of fraud against either CV or World Trade. Therefore, adjudication of this action will not, as Unisys contends, involve determinations as to the conduct of the Unisys subsidiaries. [*21] CV and World Trade simply do not have any interest in this fraud action which would require that they be added as parties.

The absence of World Trade and CV will not expose Unisys to the substantial risk of double or inconsistent verdicts. Any verdict against Unisys on CS's fraud claim will be directed at Unisys and therefore be separate and distinct from any arbitration award CS may obtain against Unisys's subsidiaries CV and World Trade in any future action for breach of contract. Even if CS were to bring a fraud action against CV or World Trade, any award in favor of CS against those subsidiaries would be distinct from any verdict CS obtained against the parent Unisys in this fraud action because of the separate identities of Unisys and CV and World Trade. See J. Moore, § 19.07-2[1], at 19-140-42 & n. 13 ("mere theoretical

possibilities" of inconsistent obligations are not enough for indispensability under Rule 19(b)).

Accordingly, we find neither CV not World Trade are necessary parties under Rule 19(a). Therefore, we need not reach subsection (b). Defendant's motion to dismiss for failure to join a necessary and indispensable party is denied.

Unisys next argues [*22] that this case must be dismissed for failure to state a claim upon which relief can be granted. Unisys's argument is twofold. First, Unisys contends that this action is barred by a clause located in a section of the 1994 Agreement headed "Termination of Original Agreements" which states: "the parties hereby waive any and all claims (whether notified to the other or not) which either of them may have arising out of the performance of or in connection with the Original Agreements or any such amendments thereto." Exhibit 4, P 2.2, p. 18. Unisys claims that "under the express terms of this waiver, all claims of fraudulent misrepresentation arising prior to March 1994 which allegedly induced CS to enter into the transactions out of which this dispute arises are waived." Defendant's Memorandum of Law at 29.

CS responds by arguing that this clause is unenforceable because the allegations in the Complaint contend that the 1994 Agreement which contains the clause was procured by fraud and that in any event the waiver clause only applies to claim brought by the parties to the 1994 Agreement against each other.[3]

[*23]

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3. While our standard of review under a Rule 12(b)(6) motion is normally limited to the allegations in the Complaint which we must accept as true, our Court of Appeals has held that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on that document." *Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)*. Here, there is no dispute as to the authenticity of the 1994 Agreement which Unisys includes in its Appendix as Exhibit 4. In addition, CS alleges in its Complaint that it entered into the 1994 Agreement as a result of misrepresentations made by Unisys. We, therefore, may consider the 1994 Agreement without converting the motion into one for summary judgment.

Since the gravamen of CS's complaint is that all of the contracts it entered into, including the 1994 Agreement, were procured by Unisys's alleged fraudulent misrepresentations, Unisys's argument must fail. In addition, the plain terms of the waiver clause bar only those claims that a party to the Agreement may have against the other party to the Agreement. ("the parties hereby waive any and all claims (whether notified to the other or not) . . .). Since it is undisputed that Unisys is not a party to the 1994 Agreement, the waiver clause does not bar CS's fraud claim against a third party such as Unisys.

Second, Unisys contends this action must be dismissed for failure to state a claim because a merger and integration clause contained in the 1994 Agreement precludes CS from claiming it justifiably relied, prior to 1994, on any alleged misrepresentations by Unisys. That clause provides that

this Agreement constitutes the entire Agreement and understanding between the Parties and supersedes all prior oral or written understandings, arrangements, representations or agreements between them relating to the subject matter of this Agreement. No director, employee or [*24] agent of either party is authorized to make any representation or warranty to the other party not contained in this Agreement and each party acknowledges that it has not relied on any such oral or written representations or warranties.

Exhibit 4, P 30.1, p. 48 (emphasis added). Unisys contends that "under Pennsylvania law, when the parties have agreed to a full integration clause that supersedes all prior representations, evidence of prior misrepresentations in support of a claim of fraudulent inducement is inadmissible under the parole evidence rule." Defendant's Memorandum of Law at 31.

Like the waiver clause mentioned above, the integration clause referenced by Unisys expressly applies only to the parties to the 1994 Agreement. Since it is undisputed that Unisys is not a party to that Agreement, the integration clause in that Agreement does not bar CS's fraud claim against Unisys.

Finally, Unisys contends this action must be dismissed on the ground of forum non conveniens because this forum is "distant from where the majority of relevant events occurred, the bulk of evidence is located, and the majority of witnesses reside." Defendant's Memorandum of Law at 32. [*25] Ironically, Unisys raises this argument despite the fact that it is being sued in a forum located approximately 30 miles from its corporate headquarters and the forum in which it wishes to proceed, Vienna, Austria, is located on another continent. See, *Lony v. E. I. Du Pont De Nemours & Co., 935 F.2d 604, 608 (3d Cir. 1991)* ("Lony II"). ("This case is puzzling in that frequently the forum non conveniens issue is raised by a defendant sued away from home who seeks to convince the court that the balance of relevant factors should be tipped against requiring it to defend far from its home jurisdiction... Here, in contrast, DuPont [the defendant], which is headquartered in Wilmington, Delaware and is the largest employer in that state, seeks to move the action against it to a forum more than 3000 miles away. It is, as Alice said, "curiouser and curiouser").

The doctrine of forum non conveniens permits a court to dismiss a case despite the existence of jurisdiction because of consideration for the interests of the litigants and in the interest of justice. See *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 91 L. Ed. 1055, 67 S. Ct. 839 (1947)*. Under the doctrine, a district [*26] court may, in the exercise of its sound discretion, dismiss a case " 'when the alternative forum has jurisdiction to hear the case, and when the trial in the chosen forum would establish... oppressiveness and vexation to defendant... out of all proportion to plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems.' " *Lacey v. Cessna Aircraft Co., 862 F.2d 38, 42 (3d Cir. 1988)* (Lacey I) (citations omitted). In deciding whether to dismiss a case under the doctrine of forum non conveniens, the ultimate inquiry is "where trial with best serve the convenience of the parties and the ends of justice." Id.

The defendant bears the burden of persuasion as to all elements of the forum non conveniens analysis. *Lacey v. Cessna Aircraft Co., 932 F.2d 170, 180 (3d Cir. 1991)* (Lacey II). First, the defendant must demonstrate that an adequate alternative forum exists as to all parties. Second, the defendant must show that the private and public interest factors[4] weigh heavily on the side of dismissal. Id.[5]

[*27]

The requirement of an adequate alternative forum is satisfied when: (a) the defendant is amenable to process in the other jurisdiction; and (b) the remedy available in the alternative forum is clearly satisfactory. Id. The alternative forum Unisys identifies in its papers is the "arbitration forum of Vienna". Memorandum of Law at 32. Unisys states that "there is no limitation on [CS] [*28] proceeding with its claim in an arbitration in Vienna according to UNCITRAL rules." Defendant's Reply Memorandum at 11-12. The trouble with this

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4. The private interest factors include: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action," and other factors "that make trial of a case easy, expeditious and inexpensive." *Gulf Oil, 330 U.S. at 508.* The relevant public interest factors include the interest in having a trial of a diversity case in a forum that is home with the law that must govern, the local interests in having localized controversies decided at home and the administrative difficulties flowing from court congestion. *Id. at 508-509.* In addition, our Court of Appeals instructs that we must 'consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to plaintiff's chosen forum.' " *Lacey I, 862 F.2d at 48,* quoting *Van Cauwenberghe v. Biard, 486 U.S. 517, 528, 100 L. Ed. 2d 517, 108 S. Ct. 1945 (1988).*

5. When, as here, the case is brought by a foreigner, the district court must also consider the amount of deference that should be accorded to plaintiff's decision to bring suit in the United States. *Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1226 (3d Cir. 1995).* Although a foreign plaintiff's choice of forum is entitled to less deference, *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981),* this is " 'not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for forum non conveniens is the exception rather than the rule.' " *Lacey I, 862 F.2d at 45-46.* (citations omitted). (emphasis in original).

contention is that we have already found that CS's fraud claim against Unisys is not governed by the arbitration clause in the 1994 Agreement since Unisys was not a signatory to that Agreement. Therefore, despite Unisys's willingness to subject itself to process in Vienna, CS is not obligated to have its fraud claim decided by arbitration in Vienna and it is unlikely that an arbitration tribunal would even have jurisdiction over that claim. Accordingly, we find Unisys has not met its burden of showing that an adequate, alternative forum exists.

Even if Unisys had met its burden, the other considerations in the forum non conveniens analysis dictate against dismissing this action. Concerning the amount of deference due to the foreign plaintiff's decision to sue in Pennsylvania, we again note that CS is suing Unisys in Unisys's home forum where its corporate headquarters are located. Our Court of Appeals has stated that "[this] in itself has considerable weight in showing that the plaintiff's choice was based on convenience." *Lony v. [*29] E. I. Du Pont De Nemoirs & Co., 886 F.2d 628, 634 (3d Cir. 1989)* ("Lony I") on appeal aft. remand, *935 F.2d 604 (3d Cir. 1991)* ("Lony II"). See, Lony II, at 608.

Moreover, an analysis of the private and public interest factors reveals that CS's choice of this forum is entitled to heightened deference. Although the exact "locus of the alleged culpable conduct" is difficult to ascertain from the allegations in the Complaint, it does appear that an entire series of misrepresentations were made orally and in writing to CS's entire board of Directors by six of Unisys's representatives, including its Chairman and CEO, at Unisys's corporate headquarters in Blue Bell, Pennsylvania on January 12, 1994. Complaint at PP 24-31. Although many of Unisys's witnesses and documents will no doubt be located in Europe, many witnesses and documents will be located in Pennsylvania as well, including the top-level representatives who attended the meeting on January 12, 1994.[6]

[*30]

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6. At this early stage of the proceedings, it is unclear exactly where each of the witnesses and documents is located.

With regard to the public interest factors, this court has a current calendar and is, of course, inherently familiar with Pennsylvania law on fraud which will likely govern this case. Further, this forum in general and a local jury in particular certainly have an interest in adjudicating a dispute in which a major local corporation is accused by a foreign bank of engaging in deceptive acts. Finally, contrary to Unisys's assertions, it would seem that most of the documents upon which Unisys's alleged misrepresentations are based would be located at its corporate headquarters in Pennsylvania rather than in Europe. In short, trial of this case in defendant's home forum where a number of the acts in the Complaint are alleged to have taken place would not establish oppressiveness and vexation out of all proportion to CS's inconvenience. The motion to dismiss on forum non conveniens grounds is denied.

For all the foregoing reasons, the petition to compel arbitration is denied and the motion to dismiss is denied in all respects. We shall direct Unisys to file an Answer to the Complaint within 20 days of the date of this Order.

ORDER

The motion of the defendant to compel arbitration [*31] is DENIED.

The motion of the defendant to dismiss is DENIED.

Defendant shall file an Answer to the Complaint within 20 days of the date of this Opinion.

IT IS SO ORDERED.

CHARLES R. WEINER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1944

CESKA SPORITELNA, a.s.,

vs.

UNISYS CORPORATION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-04152)
District Judge: Honorable Charles R. Weiner

ARGUED May 9, 1997

BEFORE: STAPLETON, LEWIS, *Circuit Judges*
and WALLS,* *District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on October 10, 1996, be and is hereby **AFFIRMED,** essentially for the reasons set forth in the district court's opinion.

As to the appellant's renewed motion for a stay pending resolution of the appeal, it is **DENIED** as moot.

Costs taxed against the appellant.

BY THE COURT:

/s/ Walter K. Stapleton

Circuit Judge

Attest:

/s/ P. Douglas Sisk

Clerk

Date: May 28, 1997

*The Honorable William H. Walls, United States District Judge for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1944

CESKA SPORITELNA, a.s.,

vs.

UNISYS CORPORATION,

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, *Circuit* Judges, and WALLS,* *District Judge.*

The petition for rehearing filed by appellant, Unisys Corporation, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Timothy K. Lewis
Circuit Judge

Date: JULY 7, 1997

*Honorable William H. Walls, United States District Judge for the District of New Jersey, sitting by designation, whose vote is limited to panel rehearing only.

CC: LPB, RLH, EJR, PJK, JBM

PETITIONER S RULE 29.6 STATEMENT

NON-WHOLLY OWNED SUBSIDIARIES OF PETITIONER UNISYS CORPORATION:

IDAT, Industria de Alta Tecnolgia, S.A.

Message e Informacao e Servicos S.A.

Procard S.A.

UNIMAC Computer Systems Ltd.

Beijing Beiyou Computer Systems C. Ltd.

Guangzhou YUNI Computer Software Co. Ltd.

Shanghai Baoni Corporation Systems Integration Company

Nihon Unisys, Ltd.

Economy Business Systems B.V.

Unisys Pakistan (Private) Limited

Unilot SzOO

Sperry Arabia Limited

Siam Unisys Ltd.

Unisys-Thai Holding Co. Ltd.

Unisys-Cyberware, Inc.